

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 8**

JBM, INC. d/b/a BLUEGRASS SATELLITE
Employer

and

CURT STAVER, AN INDIVIDUAL
Petitioner

Case No. 8-RD-2042

and

**UNITED ELECTRICAL, RADIO AND
MACHINE WORKERS OF AMERICA (UE)**
Intervenor

and

**NATIONAL PRODUCTION WORKERS UNION,
LOCAL 707**
Intervenor

DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in these proceedings to the undersigned.¹

I. Position of the Parties

The Petitioner and Intervenor urge that I direct an election in a unit limited to certain employees working out of a warehouse facility in Cleveland, Ohio known as Cleveland West. The Employer and Union argue that the only unit in which an election may be directed is a multi-facility unit covering all the Employer's facilities except one where the Intervenor is recognized.²

II. Decision Summary

¹ The Employer, the Union, Production Workers Local 707, and the Intervenor, UE, filed post-hearing briefs that have been duly considered. The Intervenor attempted to offer additional documents as exhibits following the close of the hearing. There being no agreement by the parties to my receipt of these documents, I hereby reject them and they will not become part of the record in this matter. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. The labor organizations involved claims to represent certain employees of the Employers.

² The parties also disagree over the inclusion of certain job classifications within the unit. I need not address these individual eligibility issues in light of my decision to dismiss the petition on other grounds.

I find that the petition should be dismissed as the petitioned-for, single facility unit is not coextensive with the recognized Employer-wide, multi-facility unit.

III. Background

The Employer is engaged in the installation of satellite television systems for DirecTV. It has an office and place of business in Maysville, Kentucky and 15 additional warehouse locations throughout Ohio, Kentucky, Indiana, Illinois and Iowa. The satellite technicians and other employees directly involved in the installation work are employed in areas near the warehouse locations.

The Employer entered into a collective bargaining relationship with National Production Workers Union, Local 707 (Local 707) in August 2002.³ The Employer's Director of Resources, Richard Schneider, testified without contradiction that the Employer then became party to an agreement between that Local 707 and a multi-employer association called the National Workers Master Contract Group (the Group).⁴ The Employer and Local 707 negotiated an addendum to this master agreement providing wages, benefits and terms of employment for unit employees at all its facilities. A new master agreement was then entered into between the Group and Local 707 effective from April 1, 2003 through March 30, 2006. The Employer and Local 707 then negotiated addendums to the master agreement covering wages, benefits and working conditions for all unit employees working for the Employer and a later one providing that the Employer's ESOP program was in compliance with the contract. As noted, the Employer applied the master contract and addendums at all the Employer's facilities, with the one exception noted below. There is no evidence or claim that the Employer and Local 707 ever negotiated separate agreements for any of the individual warehouse facilities, including the Cleveland West facility at issue in this matter.

The Employer does have one single facility agreement with the Intervenor (UE), covering its warehouse facility in Columbus, Ohio. This facility had previously been covered by the aforementioned master agreement and addendums until 2004. In March 2004, in settlement of a series of ULP charges, the Employer agreed to recognize the UE as the collective bargaining representative of its satellite technicians and other employees working out of this facility.

IV. The Petitioned-For Unit Is Not An Appropriate One For Conducting This Decertification Election

A. Bargaining History Establishes Only A Multi-Facility Unit Is Appropriate

The Board has long held to the general rule that the bargaining unit in which a decertification election is held must be coextensive with the certified or recognized unit. **Mo's West, 283 NLRB 130 (1989), Campbell's Soup Co., 111 NLRB 234 (1955)**. In this matter, the record is clear that the Employer and Local 707 have bargained on a multi-facility basis since 2002, the entire duration of their bargaining relationship. With the exception of the Columbus unit discussed in more detail below, there is no evidence of any bargaining on a single facility basis. Certainly there is no evidence of any single facility bargaining regarding the Cleveland West facility. Therefore, based on a series of longstanding Board decisions, including **Green-**

³ While not offered into evidence, the record testimony is clear that the Employer and Local 707 signed a recognition agreement at this time.

⁴ The Employer had been a member of this multi-employer group prior to its recognition of Local 707.

Wood Cemetery, 280 NLRB 1359 (1986) and Gibbs & Cox, Inc., 280 NLRB 953 (1986), this decertification election may not be held in anything but the recognized multi-facility unit.

The fact that the Employer agreed to recognize the UE at its Columbus facility does not mandate a different outcome. A review of the relevant documents indicates that my counterpart in Region 9 (Cincinnati, Ohio) determined that the Employer had unlawfully extended recognition to Local 707 at the Columbus warehouse. However, no such finding was ever made by the Board. The settlement agreement wherein recognition was extended to the UE can not be viewed as an admission by the Employer or Local 707 that their recognition agreement was unlawful. **Douglas-Randall, Inc., 320 NLRB 431, 433 (1995)**.⁵ Whether or not the 2002 recognition agreement between the Employer and the Production Workers Union was supported by a showing of majority support may no longer be litigated. **Machinists Local 1424 (Bryan Mfg. Co.) v. NLRB, 362 U.S. 411 (1960), Gibbs & Cox, Inc., at 967, fn. 21.**

It is true that the Board has permitted a decertification election in a single facility unit where it had been merged into a larger unit for only a short period of time. **Duke Power Co., 191 NLRB 308 (1971)**. However, such a finding would only be warranted where (1) the history of multi-facility bargaining could be counted in months not years and (2) where there was some history of single facility bargaining involving the facility in question. Neither is true in the instant case.⁶

B. Arguments For A Single Facility Unit Are Not Supported By The Record

The Intervenor has raised a number of additional arguments as to why I should discount the bargaining history and direct an election in a single-facility unit.⁷ First, it argues that the current contract between the parties is non-binding. I must respectfully disagree. The fact that the Employer has the right to terminate the agreement under certain limited conditions, i.e. with notice 15 days before the anniversary date or if the benefit funds seek an increase in contributions, does not make it illusory. I must also disagree with the argument that termination of the contract will also terminate the bargaining relationship between the parties. There is nothing in the language of the contract or the Act that would support this argument.

The Intervenor further argues that Local 707 has “abandoned” the unit employees. I assume it means to argue that Local 707 is defunct and, therefore, its contractual relationship with the Employer should not be given any weight. An organization is considered defunct only when it is unable or unwilling to represent the employees. **Hershey Chocolate Corp., 121 NLRB 901 (1958)**. There is no record evidence to support such a contention here. Local 707 and the Employer have regular contact over a myriad of matters relating to collective bargaining. The Union has filed and pursued a number of grievances on behalf of employees in recent times.

⁵ In fact the record indicates that the Employer is currently pursuing action in federal court to set aside this part of the settlement.

⁶ The other exception to the general rule, also not applicable here, allows for an election in a single-facility unit where the employer made a timely withdrawal from a multi-employer bargaining group. See **Albertson's Inc., 273 NLRB 286 (1984)**.

⁷ I have already addressed its arguments regarding whether the Union established majority support at the time the recognition agreement was entered into. Such an argument may not be raised in a representation case context and Section 10(b) of the Act precludes the issue from now being raised in an unfair labor practice proceeding. **Gibbs & Cox, Inc., supra.**

At most, the Intervenor can claim that the Union's representation is not satisfactory to some employees. However, such an assertion falls far short of showing that the Union is defunct. See **Standard Oil Company of California, 211 NLRB 67, 68 (1974).**

The Intervenor also argues that I should ignore the bargaining history because (1) a minority share of the Employer's stock has been purchased by employees through an ESOP and/or (2) because the Employer has recently merged with another entity. First, mere change in the ownership of a corporation does not provide a basis for either party to the bargaining relationship from repudiating said relationship. **Phillip Wall & Sons, 287 NLRB 1161 (1988).** Since there is no evidence that the ESOP has had a significant impact on the nature of the bargaining relationship between the Employer and Local 707, I find no basis for ignoring the parties' bargaining history. The Intervenor has cited me to no authority to the contrary. As for the alleged merger with another entity, the record is clear that a merger was contemplated, but never occurred.⁸

Finally, the Intervenor argues that the recognized multi-facility unit is "improper". Its arguments in this regard are two-fold: (1) that the contract documents do not clearly describe the bargaining unit and (2) there are classifications and positions included in the recognized unit that the Board would not have included if it had determined the scope of the unit **ab initio**. Initially, I note that the applicable addendum to the master agreement makes clear that the bargaining unit includes all full-time hourly employees. The testimony provided by the Employer's witness Schneider makes clear that this includes, as the Intervenor contends, certain office clerical and similar positions that the Board may not have included in a unit with installation technicians were it making the determination initially. However, it is well recognized that units resulting from well-established bargaining relationships will not be disturbed where they are not repugnant to the Act's policies. The Board places a heavy evidentiary burden on a party attempting to show that historical units are no longer appropriate. Indeed, "compelling circumstances" are required to overcome the significance of bargaining history. **Banknote Corp. of America, v. NLRB, 84 F.3d 637, 647 (2d Cir. 1996), quoting Banknote Corp. of America, 315 NLRB 1041, 1043 (1994).** In fact, the Board, in decertification proceedings, will only make unit exclusions required by statute; that is, supervisory employees (**Ellis-Klatcher & Co., 79 NLRB 183 [1948]**), guards from a unit that includes non-guards (**Fisher-New Center Co., 170 NLRB 909 [1968]**) and professionals from a non-professional unit where the professionals were included without a self-determination election (**Utah Power & Light Co., 258 NLRB 1059 [1981]**).⁹

In conclusion, I find, based on the above and the record as a whole, that the unit requested by the Petitioner and Intervenor is inappropriate because of the bargaining history.¹⁰ I will therefore dismiss the petition.

⁸ Even if such a merger with this entity known as DirecTECH had occurred, there is no evidence that it would have impacted any unit employees.

⁹ I need not determine if the head area technicians (HAT's) should be excluded from the unit as supervisors as the petitioned-for unit is otherwise inappropriate.

¹⁰ Even if this matter had come before me as a result of a petition filed by another labor union rather than in the context of a decertification petition, I would still find that only a multi-facility unit was appropriate based on the record evidence relating to the Employer's centralized assignment of work; temporary interchange of employees between facilities; common wages, benefits and work policies, lack of autonomy at the level of the individual facility and, of course, the bargaining history. **Trane, Inc., 339 NLRB 866 (2003)**

ORDER

It is hereby ordered that the petition in this case be, and it hereby is, dismissed.

RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision and Order may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by March 17, 2006.

DATED at Cleveland, Ohio this 3rd day of March 2006.

/s/ [Paul C. Lund]

Paul C. Lund
Acting Regional Director
National Labor Relations Board
Region 8